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Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1972

No. 72-946

PATRICK MUSTO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR REHEARING

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Petition for Rehearing On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Petitioner Patrick Musto respectfully prays that this Court grant him a rehearing of its denial of his petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit for the reasons set forth in the affidavits annexed hereto.

Wherefore, your petitioner prays that this Court grant him a rehearing of its denial of the petition for Writ of Certiorari, grant him permission to file the reply brief set forth in the appendix herein and grant his petition for the Writ of Certiorari.

Joseph L. Freiman
Attorney for Petitioner

Appendix A

Affidavit of Joseph L. Freiman

STATE OF NEW JERSEY)
)
COUNTY OF HUDSON)

JOSEPH L. FREIMAN, being duly sworn on his oath according to law, deposes and says:

1. On March 8, 1973, I sent to the printer a reply brief in the above matter with instructions to print same and mail it to this Court with copies to the Solicitor General of the United States.

2. I have been informed as set forth in the affidavit of the printer that the briefs were actually delivered to the United Parcel Service on March 14, 1973, for delivery to this Court. They were returned to the printer by the United Parcel Service because the driver could not find the office of the Clerk. The printer then mailed same to this Court. The briefs were received after this Court had denied the petition for the Writ of Certiorari.

3. I am of the belief that the reply brief, a copy of which is printed in the appendix, contained argument which would have persuaded this Court to grant the Writ of Certiorari. The failure to file the reply brief with this Court before the Court acted on the petition was clearly due to no fault of the petitioner or his attorney and the petitioner should not be penalized therefor.

It is therefore respectfully submitted that this Court in its discretion grant the petitioner a rehearing, permit the reply brief to be filed and grant the petition for the Writ of Certiorari.

s/ Joseph L. Freiman
Joseph L. Freiman

Sworn to and subscribed
before me this 22nd day
of March, 1973.

s/ Kathryn M. Kilduff

KATHRYN M. KILDUFF
Notary Public of New Jersey
My Comm. expires Nov. 19, 1974

Appendix B

Affidavit of Nathaniel Lutz

STATE OF NEW JERSEY)
) ss.:
COUNTY OF MIDDLESEX)

NATHANIEL LUTZ, being duly sworn according to law, and being over the age of 21 upon my oath depose and say:

1. I am President of LUTZ APPELLATE PRINTERS, INC. having its principal place of business at 60 Main Street, South River, New Jersey.

2. On March 9, 1973, we did receive from Joseph L. Freiman, Attorney, a Reply Brief in the matter of Patrick Musto, Petitioner, vs. United States of America, Respondent, No. 72-946, to be prepared and sent to the Supreme Court of the United States and Irwin N. Griswold, Solicitor General.

3. Due to a labor problem in our plant, said Reply Brief was sent via United Parcel Service on March 14, 1973, to the Supreme Court of the United States.

4. Because of an error in the shipping department the Reply Brief was not sent to the Solicitor General, but was sent to the United States Attorney in Newark.

5. On March 20, 1973, the package containing said Reply Briefs addressed to the United States Supreme Court was returned to this office with a

notation requesting a more complete address, i.e.: room number.

6. On March 20, 1973, this package was re-wrapped and sent to the Supreme Court of the United States by First Class, United States Mail.

s/ Nathaniel Lutz
Nathaniel Lutz

Sworn to and subscribed
before me this 22nd day
of March, 1973.

s/ Lorraine Leotta
A Notary Public of the
State of New Jersey

LORRAINE LEOTTA
Notary Public of New Jersey
My Comm. expires April 13, 1977.

Appendix C

In The

Supreme Court of the United States

October Term, 1972

No. 72-946

PATRICK MUSTO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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STATUTES CITED:

Hobbs Act 1, 2, 4, 5

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In The

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REPLY BRIEF FOR PETITIONER

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

1. Petitioner, by way of reply to the argument of the Government, would point out that the Hobbs Act provides that "extortion means the obtaining of property — by wrongful use of actual or threatened force, violence or fear" which must of course, run from the defendants, is not applicable to a case where, as here, there has been no testimony whatsoever that anyone was told by anyone that unless they paid money they would not get the business.

It was also admitted by every witness who testified concerning that matter, that bids were always awarded to the lowest bidder no matter who it was.

Clearly the acts for which this defendant was convicted were insufficient to fall within the interdiction of the Hobbs Act.

2. It should be pointed out that the Government's Second Point cites Dunn vs. United States, 284 U.S. 390 for the proposition that inconsistent verdicts are permissible. Dunn involved inconsistent verdicts with respect to a single defendant. The only case involving inconsistent verdicts as to several defendants was Rosenthal vs. United States, 276 F.714 (C.C.A. 9) (1921), cited in my petition for the Writ of Certiorari.

3. As to the Government's Third Point, counsel has examined United States vs. Knox Coal Company, 347 2d 33 (C.A. 3) and all the cases cited in connection with the discussion of the Jenks Act as found on page 47 of said Opinion. None of them raise the question as to whether or not the material furnished by the Government can be introduced without testimony of the F.B.I. agent who took the statement. The statement in the footnote found on page 6 of the Government's brief that Borelli specifically stated that when a witness is confronted with and denies what appears to be an inconsistent statement counsel's only recourse is then to call the agent who took the statement and endeavor to prove to the contrary, is mistaken. Counsel refers to pages 392 and 393 of the Opinion. There is no such statement there.

There is no reported case wherein the question of admissability of Jenks material into evidence has been decided by this Court or any Circuit Court of Appeals. This Court should grant Certiorari in order to decide once and for all whether Jenks material furnished by the Government is admissible without aliunde testimony.

4. With reference to the Government's Fourth Point, it must be borne in mind that the testimony concerning payments made to O'Malley ended right there. There was no testimony that any of the payments received by O'Malley went anywhere else. Furthermore, those who testified concerning payments made to O'Malley were not the victims mentioned in the indictment but were others whose testimony was received over objection of the defendant.

Under those circumstances, the charge of the Court permitting a conviction if petitioner conspired with O'Malley (App. J) clearly violated petitioner's constitutional rights.

5. The Government misconceives the challenge to the Court's refusal to strike the testimony of Tobler as set forth in its Fifth Point. The conversation that Tobler had was a telephonic conversation and when that fact was developed for the first time on cross examination, counsel then moved to strike the testimony on that ground and on the other grounds as set forth therein. The Government's attempts to bolster Tobler's testimony by alluding to the testimony of Fenton and Castorino, who incidentally are the only witnesses

who in any way attempted to connect this defendant with the conspiracy. The jury evidently did not believe Castorino's testimony as discussed in the Petition for the Writ of Certiorari. The defendant did not have the opportunity to impeach Fenton's testimony and Tobler's testimony was completely inadmissible. It was upon this testimony that the defendant was convicted. Clearly the conviction should not be permitted to stand.

6. This Court on February 22, 1973, decided the case of United States vs. Enmuns et al.(No. 71-1193). It reiterated that the Hobbs Act being a criminal statute must be strictly construed and any ambiguity must be resolved in favor of lenity. It also held that the Acts interdicted must be explicit so as to lead to the conclusion that Congress intended to put the Federal Government in such a position which would work an unprecedented incursion into the criminal jurisdiction of the States, and reaffirmed its decision in United States vs. Bass, 404 U.S. 336, 349, where it said:

> "(U)nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the State ... (W)e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction."

It is respectfully submitted that the conviction in the case sub judice also goes far beyond what the Hobbs Act intended to interdict. If there has been a violation of criminal law, the several states are well able to vindicate same.

Conclusion

It is therefore respectfully submitted that the petition for a Writ of Certiorari be granted.

Respectfully submitted,

Joseph L. Freiman
Attorney for Petitioner